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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ZACHARY MENA,

Defendant and Appellant.

E032374

(Super.Ct.No. FSB028333)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ronald M. Christianson, Judge. Affirmed.

David P. Lampkin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez, Supervising Deputy Attorney General, Felicity Senoski and Lynn G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Zachary Mena of second degree murder. (Pen. Code, § 187, subd. (a)), during which he used a knife (Pen. Code, § 12022, subd. (b)(1)). He was sentenced to prison for 15 years to life, plus one year. He appeals, contending reversible error was committed in the admission of evidence and instruction of the jury. He also asserts that his trial attorney was incompetent. We disagree and affirm.

FACTS

Mena, a prospective member of the Vagos Motorcycle Gang, Manuel Enriquez, a full member and officer, and a second prospective member, together with female companions and Mena's cousin, attended a Halloween party at the victim's home on October 28, 2000. Mena was wearing a sheath around his waist that held a six-inch-blade knife. No one else at the party was seen with a knife.

Mena stared at a party guest in an intimidating fashion and rudely bumped into others. He got into an argument with the victim's cousin over the latter's attention to a young lady who was with Mena. Mena got Enriquez and the other prospective member from inside the house and they went outside to the west side of the house, near the gate where they had entered the party.

The victim confronted Enriquez about bumping into him. He demanded that Enriquez and those with him leave the party. There was an argument. Enriquez punched the victim in the face. The victim got help. Before he returned, Mena asked Enriquez who "was tripping" and Mena pulled his knife out of its sheath and held it down by his side, as if to hide it.

The victim returned with friends and again demanded that Enriquez's group leave. Enriquez and the other prospective member grabbed the victim and pinned him to a nearby wall. Mena ran fast at him and thrust his right hand into the victim's midsection. The victim doubled over and the three assailants went out the gate, while the victim and others began fighting and streaming out the gate onto the area in front of the house.

There was a physical encounter between the victim and Enriquez's wife. In the front, the other prospective member kicked a man in the head who was on all fours on the ground. One of the partygoers hit the prospective member over the head with a bottle and the former fell to the ground.

The group ran across the street and people yelled that "they got [the victim]" and that Mena had a knife. Either before or after this, there was another fight between the victim and his friends and Mena and his friends. The victim told his friends to "get" Mena after Mena taunted them to come at him. The victim collapsed. Mena, Enriquez and the latter's wife ran down the street, followed by the angry crowd. A pursuing partygoer hit Mena with a glancing blow and the latter swiped at the former with his knife, cutting the former's shirt and chest. Mena swung his knife at another pursuing partygoer's stomach. When Mena got down one block, to the street where Enriquez's truck was parked, he swung his knife at the crowd. Mena, Enriquez and his wife got into the truck. Mena told Enriquez to get the gun. Someone yelled that Enriquez and his companions had a gun.

Mena sustained a knife wound on his left hand. Blood comparable with his, but not with the victim's, Enriquez's, or the other prospective member's, was found on the west side of the victim's house. At the emergency room, Mena was very nervous and anxious about getting back the clothing he had been wearing at the party and which had been taken from him, saying there was something in the pockets he needed. Although Mena's clothes were placed at the emergency room nurses' station, they disappeared and were never retrieved. Neither was his knife.

The victim died from a four- or five-inch-deep knife wound to his right abdomen that cut his liver, the two major veins behind it, his pancreas, and his small bowel. The pathologist who performed the autopsy opined that it would take several minutes for the victim to collapse from such an injury. He also opined that it was possible for the victim to have been stabbed on the west side of the house, and to have made it to the point in the street where he collapsed and to have not realized that he had been injured.

More facts will be discussed as they are pertinent to issues addressed.

ISSUES AND DISCUSSION

1. *Failure to Instruct on Involuntary Manslaughter*

Mena here asserts that the trial court should have sua sponte instructed the jury on involuntary manslaughter based on the "misdemeanor involuntary manslaughter" theory that the stabbing of the victim occurred while he was brandishing his knife, i.e., drawing or exhibiting it in an angry or threatening manner or unlawfully using it in a fight or quarrel. (Pen. Code, § 417, subd. (a).) Such an obligation existed only if there was

substantial evidence presented that Mena committed a misdemeanor involuntary manslaughter and not a greater offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) We disagree with Mena that there was such substantial evidence.

He asserts that given the testimony by a number of eyewitnesses that there was commotion, people jumping on other people's backs, scuffling, pushing and fighting involving a number of people, jurors could reasonably conclude "that a person holding a . . . [knife] in the midst of such a melee could readily inflict a wound unintentionally as the result of forces beyond his control." Unfortunately, the *possibility* that this could have happened does not amount to substantial evidence that it did. More importantly, although some witnesses described the above mentioned occurrences,¹ none of them ever

¹ One such witness described simply "[a] lot of pushing, shoving-type thing. A lot of people around, surrounding." However, he did not say how many were involved or if any of them included the victim and Mena. He did not testify that he saw the victim get stabbed. Another witness testified there was an out-of-control fight that occurred on the west side of the victim's house. She also said that she saw the victim getting punched on the air conditioner, but she could not see who was hitting him. She said nothing about the victim getting stabbed. Another witness saw the victim shoving Mena and his companion towards the west gate and swinging at them. He did not testify that he saw the victim get stabbed. The victim's brother testified that he saw "some arms flying like punches, and I had seen [the victim] fall back." He added that he had seen Enriquez hit the victim in the face. He did not testify that he saw the victim get stabbed. A defense witness testified that after Enriquez hit the victim, a scuffle erupted between them and the witness, during which there was "commotion," and, thereafter, "everybody started coming and . . . [¶] going crazy, like trying to fight whoever was fighting and trying to pull each other off and break everything up." However, he later testified that "a bunch of people" were present during the fight, but were scattered around, "not really . . . [¶] . . . doing . . . anything." During this time, Enriquez and the victim were locked in a fighting embrace. After someone jumped on the witness's back, he threw the person off and moved out the gate. He had not seen Mena earlier when he and the other two were

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tied them specifically to the point in time at which Mena fatally stabbed the victim. In fact, none of these witnesses testified to seeing the victim being stabbed or to Mena exhibiting the knife in an angry or threatening manner or using it during a fight or quarrel other than waving it at the crowd at a point in time when no witnesses testified that the victim was being stabbed contemporaneously. Thus, there was no evidence that the stabbing occurred during any so-called melee or that any brandishing of it by Mena resulted in the fatal stabbing.² Certainly, Mena's own testimony did not support either of these scenarios. He denied ever stabbing the victim, or even knowing who he was. Neither did the fact that, somehow, Mena's hand got cut. There was no evidence as to

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scuffling and he did not see him at that point. He did not testify that he saw the victim get stabbed. Enriquez's wife testified that while she, her husband and the victim were standing alone together, the latter rushed Enriquez and hit him. People crowded around them. A friend of the victim's joined them. After the two men jumped Enriquez, she got Mena and two others to help her husband. When she returned, she saw 15 to 20 men jumping her husband. She jumped on top of them and the victim hit her, causing her to be thrown off the crowd. He grabbed her purse and beat her. Mena hit the men who were rushing him. She and Enriquez ran out the gate. She did not testify that she saw the victim get stabbed. Finally, another defense witness testified that after the victim and Enriquez argued, the latter hit the former and two men came to aid the victim and jumped Enriquez near the air conditioner. Enriquez's wife tried to pull one of the men off her husband and they exchanged blows before Enriquez grabbed her and they ran out the gate, followed by the crowd. This witness did not testify that he saw the victim get stabbed.

² Thus, Mena's assertion that the testimony of a female partygoer that she saw Mena pull the knife out of the sheath he wore at his waist and hold it at the side of his leg, as though to conceal it, did not justify the giving of such an instruction. Not only does this action not constitute brandishing, but the witness did not tie it to the moment when the victim was fatally stabbed. More importantly, Mena's holding the knife pointed down at the side of his leg could not possibly have resulted in the victim being

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how the cut was administered, when, or by whom, except Mena's own testimony that someone else stabbed him while he was on the west side of the house, at a time when he did not have his knife in his hand, and the fact that blood comparable to his was found at the west side of the house. Even if Mena had accidentally cut himself while stabbing the victim, it still does not, as he now asserts, constitute substantial evidence that his stabbing of the victim was also unintentional.

The California Supreme Court has upheld the trial court's refusal to give instructions on involuntary manslaughter by brandishing in a case where the defendant admitted having intentionally shot the victim. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1145.) Conversely, they condemned the failure to give the instruction sua sponte where there was evidence that the defendant lacked the intent to kill. (*People v. Lee* (1999) 20 Cal.4th 47, 61.) Here there was no substantial evidence that Mena's stabbing of the victim was unintentional.

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stabbed.

2. *Expert Testimony on the Vagos Motorcycle Gang*³

a. *Admission of the Testimony*

Before trial began, the trial court overruled Mena's objection to anticipated expert testimony concerning the Vagos Motorcycle Gang, on the grounds that it would be more prejudicial than probative concerning the issues of motive and identity. Mena here challenges that ruling.

As is pertinent here, the expert's anticipated testimony was that prospective members of the gang "tend to whatever a full member asks of [them], including acts that are illegal (. . . participate in acts of violence. . .)" He said that a prospect "needs to prove to all [the] members that he is worthy of becoming a full member." He reported that, in an undercover capacity, he was not selected to be a prospective member until he responded affirmatively to questions whether he "had what it t[oo]k . . . to kill someone as a Vago," whether he "could kill someone, even if it was for a Vago member that [he] did not like, who was done some sort of injustice. . ." and whether he "would die for the club."

At trial, the expert testified that prospective members were told that they were "to protect all members at all costs and . . . do whatever's asked of you to do in regards to . . .

³ Why appellate counsel for Mena ignored our directive to request early transmission of the expert's declaration to this court (letter dated December 5, 2002), which he acknowledges, in his opening brief, was a trial exhibit, is beyond us. There is a reason for our directive. Ignorance of it leads to delay for the defendant and irritation for this court, both completely unnecessary.

protecting . . . members.” He recounted that before becoming a prospective member, as an undercover officer, he had to say that he had what it took to be a member, to kill for the gang, and to kill for a member even if he did not like the individual. He reported that other prospective members had been asked the same questions. He added that “[i]f there was ever any altercations or anything like that[,] you never let a . . . member hit the ground At all costs you would protect a [member] from . . . being knocked to the ground. You needed to defend him whether it be one [member] or several . . . [¶] [regardless whether] . . . they were in the right [¶] [I]f . . . you . . . do not[,] . . . you. . . can face disciplinary action to include physical harm and/or remov[al] from the club [¶] If a . . . member was involved in any altercation verbally or non verbally or physical . . . [¶] . . . [¶] [a]nywhere in the community . . . at anyplace . . . , [¶] . . . the prospect . . . needs to be on top of that individual who’s arguing or in an altercation with the . . . member . . . to show his allegiance to what he’s doing and to the . . . member himself.” He listed among the things prospective members would do in the presence of members, “committing acts of violence or . . . types of crimes that you . . . think they’re involved in.”

Contrary to Mena’s present assertion, the proposed testimony, and the eventual testimony at trial, did, in fact, demonstrate a motive on Mena’s part to interact violently

with the victim, who had challenged and possibly even been the aggressor in a physical confrontation with Enriquez,⁴ even to the point of killing the victim.

The fact that Mena may have had an independent motive to assist Enriquez, due to the possibility that they were friends, did not, as Mena now asserts, render this evidence cumulative.⁵ Moreover, law-abiding people do not commit crimes of violence just because a friend is involved in a dispute. According to the expert, prospective members of the Vagos do precisely that for members. While we agree with Mena that gang evidence is inflammatory, that does not mean that the trial court abused its discretion (*People v. Lucas* (1995) 12 Cal.4th 415, 449) in this particular case by finding that the probative value of this testimony outweighed its prejudicial impact.

b. *Failure of Trial Counsel to Request a Limiting Instruction on It*

Defense counsel below failed to request a limiting instruction about the jury's use of the expert's testimony. Contrary to Mena's present assertion, the fact that a limiting instruction was given concerning testimony that six months before these crimes, Mena, and, inter alia, one of his codefendants, had beaten up someone for wearing what the Vagos considered to be their signature jacket did not absolve counsel of the responsibility for requesting a limiting instruction on the gang expert testimony.⁶ We also disagree

⁴ So Enriquez's wife testified.

⁵ Moreover, Mena did not object below to the evidence on this basis; therefore, he waived it. (Evid. Code, § 353.)

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with Mena's assertion that the trial court had a sua sponte obligation to give such an instruction. As Mena himself acknowledges, that obligation exists only when "unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Collie* (1981) 30 Cal.3d 43, 64.) The expert testimony here did not relate to Mena's past offenses, and was not minimally relevant to any legitimate purpose. The only basis upon which Mena may now attack the failure of his attorney below to request such an instruction is by claiming that that failure amounted to incompetency of trial counsel.

In order to prevail, Mena must demonstrate a reasonable probability that absent the instruction, he would have enjoyed a more favorable outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) As the People point out, the trial court remarked after trial that defense counsel had made a tactical decision not to request such an instruction. Even if this were not the case,⁷ it impresses us as being glaringly obvious to the jurors that the gang expert testimony was introduced to show the two matters for which such an instruction would have directed them that they could have used the

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⁶ In a related argument, Mena attempts to use the giving of this instruction as a springboard for his argument that the trial court abused its discretion in failing to include the gang expert testimony in that instruction. The instruction given related to past bad acts by the defendant, a subject very different from the gang expert's testimony.

⁷ We note that when this statement was made, defense counsel was not the same attorney who tried the case for Mena and may have not been aware of the latter's tactics,
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testimony. Those are Mena's motive for fatally stabbing the victim, and, less significantly, that it was Mena, and no other, who fatally stabbed the victim.⁸ We find it highly unlikely in the face of an instruction directing the jurors not to be biased or prejudiced against Mena and to determine his guilt beyond a reasonable doubt on the evidence presented that they would have used this testimony to decide that Mena was a bad guy and, significantly for that reason, committed second degree murder.

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

WARD

J.

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such that he could have confirmed or disputed the statement.

⁸ We say less significantly because there was other evidence adduced at trial demonstrating that Mena was the stabber. However, there was far less other evidence showing a motive for the crime.